

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

DOCKET
00-AFC-12
DATE JUN 15 2005
RECD. JUN 15 2005

In the Matter of:)

) Docket No. 00-AFC-12

Application for Certification of Duke Energy for the)
Morro Bay Power Plant Project)
(MORRO BAY))
_____)

**APPLICANT'S RESPONSE TO PRESIDING MEMBER'S AMENDED ORDER
AUTHORIZING DEMOLITION OF THE MORRO BAY TANK FARM**

Duke Energy Morro Bay LLC ("Applicant") respectfully submits this response pursuant to the Notice of Commission Hearing to Consider Presiding Member's Amended Order Authorizing Demolition of the Morro Bay Tank Farm. Applicant strongly supports the Amended Order and has no comments or revisions. Applicant also appreciates the deletion of condition of certification AQ-C3 and agrees to the addition of condition NOISE-2.

In comments filed yesterday (June 14), the City of Morro Bay asks the Commission to add Condition of Certification Land No. 1 as a condition applicable to the tank farm demolition. That condition would require that Duke complete its lease negotiations for the once-through cooling outfall with the City and file the executed lease "prior to November 15, 2004 or prior to the start of commercial operation, whichever occurs first."

For several reasons, the Committee has properly refused to include this condition. First and foremost, Condition Land No. 1 pertains to the use of City-administered property that in no way involves the tank farm demolition. The lease pertains solely to the once-through cooling

discharge outfall. Nothing in the tank farm demolition involves use of this outfall or modifies the outfall structure in any way. Accordingly, Condition Land No.1 is completely irrelevant to the demolition of the tank farm.

Second, the Condition is on its face inappropriate. It contains a compliance date that has already occurred and it refers to “commercial operation” when the tank farm demolition has no such “commercial operation.” These problems underscore that the Condition was never intended to apply to tank farm demolition.

Third, the City’s purpose in seeking this plainly irrelevant condition is self-evident: it seeks leverage in its negotiation with Duke. The Commission should not be in the business of seeking to influence private property negotiations between applicants and land-owners or administrators.

Moreover, even if providing leverage to the City *were* a legitimate Commission objective, encumbering the tank farm demolition is an ineffective means of doing so. There is no revenue, let alone profit, for Duke in demolishing the tank farm. Duke proposes to initiate the demolition now simply because of the benefit to others (including the City) of doing so. Indeed, the City has made clear that it supports the tank farm demolition. The practical effect of the City’s proposed condition will be to delay the tank farm demolition until the lease issues are resolved; it will not hasten conclusion of the lease negotiations.

Fourth, the City does not need help from the Energy Commission to enforce applicable provisions of state law regarding the use of tidelands property. If the City wishes to seek enforcement of these laws, other forums exist for the parties to resolve this dispute.

Finally, Duke does not solely control the lease negotiations and therefore is not able to comply with the Condition absent cooperation of the City. Duke will refrain from revealing the negotiating positions of the parties in this pleading. Suffice it to say, however, that Duke’s


discretion to agree to lease provisions sought by the City is not unlimited. Duke cannot legally agree to provisions that violate its obligations to shareholders by imposing costs that the existing project economics cannot sustain. Until Duke and the City can *mutually* agree to lease provisions that are sustainable for *both* parties, the lease impasse will continue regardless of any condition of certification applicable to the new project.

In sum, the Commission should reject the City's proposed addition of Condition Land No. 1 because it is not relevant to the tank farm demolition project and because the practical effect of the condition would be to delay it. Such a delay benefits no one, including the City.

Respectfully submitted,

Dated: June 15, 2005

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PROOF OF SERVICE

I, Ron O'Connor, declare that on June 15, 2005, I deposited copies of the attached *Applicant's Response to Presiding Member's Amended Order Authorizing Demolition Of The Morro Bay Tank Farm* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.


Ron O'Connor

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